

### **Remarks**

Attached is a replacement drawing showing an amendment to Figure 2 to include the reference to element 12a. Element 12a (a bulb) was depicted in the original figure and was referenced in the specification at, for example, page 3 at line 28. Additionally, one of ordinary skill in the art at the time the application was filed would be able to determine from the specification and the drawings what bulb 12a references in the drawings. Therefore, no new matter has been added.

Claims 1 and 3 include the phrase “being located in a subject body.” Further review of claim 4 revealed that it did not contain such phrase (ignoring that it depends on claim 1, which does contain such phrase). While the applicant believes that such language does particularly point out and distinctly claim subject matter which the applicant regards as his invention, the applicant agrees that broader language can be used in order to broaden the scope of his claims. Therefore, the applicant has amended the claims to include language that is broader than the previous language.

With respect to claim 7, the applicant respectfully suggests that the claim is directed to statutory subject matter. The fact that the claim contains the term human and that the claimed subject matter is for use with humans does not make the claim directed to non-statutory subject matter. The term “human” is used in many claims allowed by the patent office. See, for example, U.S. patent nos. 6,697,662; 6,697,451; 6,696,600; 6,696,550; and 6,696,272 to name a few. Indeed, claim 10 of U.S. patent no. 6,696,272 includes a human cell, which is a body part. The claim is not for a human being per se, but is directed instead to where the subject body of the claimed device “is in . . . a living human” and alternatively “is intended for use in, a living human.” It is respectfully suggested that the claim is directed to statutory subject matter and that this rejection be withdrawn.

With respect to claims 1, 5 and 7, it is respectfully pointed out that these claims are not anticipated by Deficis. Deficis discloses a probe for calculating *temperature* not for measuring the *fluid*. The claimed terminology “measurement of the fluid length” would include many different ways of measuring the fluid, such as measuring the position or location of the fluid, measuring the location or position of a portion of the fluid (such as an end or meniscus), or even indirectly measuring a location or position of the fluid indirectly by measuring the end of a thermometer body portion that contains no fluid. However, Deficis merely teaches calculating temperature by determining an amount of reflected light and discloses no teaching of measuring the *fluid*. Newly added claims 10-20 differentiate from Deficis for a number of reasons, including that claims 10-19 require that the “thermometer body properties and fluid properties together making possible determination of the fluid position outside of the subject body *without requiring the use of a physical connection to the device from outside the subject body*” and claim 20 requires that “thermometer body properties and fluid properties together making possible determination of the fluid position outside of the subject body *without requiring any portion of the implant to protrude from the surface of the subject body*.” Neither of which is shown by Deficis.

The undersigned attorney noted the non-statutory double-patenting rejection of claims 1 and 2 based upon U.S. Patent No. 6,250,800. The undersigned attorney notes that the rejection may no longer apply to the claims 1 and 2 because of the amendments made to claim 1. If the rejection is renewed with respect to the amended claims, the applicant may choose to file a terminal disclaimer, further amend the claims, or split off certain claims into a new application after all the claims have been indicated as allowable. Please note, however, that the applicant does not admit that the rejection is correct and reserves the right to traverse the subject rejection or similar rejection to the claims as amended herein. Even if the applicant chooses to file a

terminal disclaimer, the filing of such terminal disclaimer does not constitute an admission of the correctness of the rejection.

In lieu of the foregoing remarks, all claims should be in condition for allowance. The undersigned attorney requests the opportunity to discuss any perceived problems with the claims, to further explain any of the points raised herein, and to discuss placing claims in condition for allowance. The undersigned can be reached through his direct phone number (312) 427-3813.

Please advise when you would be available for a telephone conference.

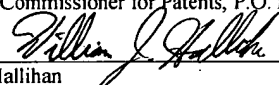
Respectfully submitted,

HALLIHAN INTELLECTUAL PROPERTY LAW, LTD  
300 South Wacker Drive  
Suite 3000  
Chicago, Illinois 60606  
312-427-3813

By   
William J. Hallihan, Reg. No. 39,210

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I hereby certify that, on March 3, 2004, this correspondence is being deposited with the U. S. Postal Service with sufficient postage as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450

  
William J. Hallihan